

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

STEVEN LEE FIELD, )  
Plaintiff, )  
v. )  
DANIEL O. COULSON; JAMES E. )  
SANDVIK; KRISTOPHER PAUL )  
BARTER; BEAVERTON POLICE )  
DEPARTMENT; PORTLAND POLICE )  
BUREAU; TRI-MET TRANSIT )  
AUTHORITY; CITY OF BEAVERTON; )  
CITY OF PORTLAND, )  
Defendants. )  
)  
No. 04-1524-HU  
FINDINGS AND RECOMMENDATION

Bryan W. Dawson  
Dawson & Dawson  
5695 Hood Street  
West Linn, Oregon 97068  
Attorney for plaintiff

James G. Rice  
Deputy City Attorney  
Office of City Attorney  
1221 S.W. Fourth Avenue, Room 430  
Portland, Oregon 97204  
Attorney for defendant City of Portland

HUBEL, Magistrate Judge:

Plaintiff Steven Field brings this action against Beaverton

## FINDINGS AND RECOMMENDATION Page 1

1 Police Officer Daniel Coulson, Tri-Met Transit Officers James  
2 Sandvik and Kristopher Barber, the Beaverton Police Department, the  
3 Portland Police Bureau, the Tri-Met Transit Authority, the City of  
4 Beaverton, and the City of Portland. He asserts claims under 42  
5 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents, 403 U.S. 388  
6 (1971), for violation of his Fourth and Eighth Amendment rights,  
7 due process and equal protection; violation of the Oregon  
8 Constitution; and assault and battery. Defendant City of Portland  
9 (the City) moves to dismiss the complaint on the grounds that 1)  
10 plaintiff's § 1983 claims are barred by the statute of limitations  
11 because plaintiff failed to serve a copy of the summons and  
12 complaint on the City within the time allowed by either Oregon law  
13 or the Federal Rules of Civil Procedure, and has failed to serve  
14 any of the individual officers at all; 2) named defendant Portland  
15 Police Bureau (PPB) is not amenable to suit in a § 1983 claim; 3)  
16 the complaint does not allege that the City has an official policy  
17 or custom which is the cause of plaintiff's constitutional  
18 deprivation, and therefore under Monell v. Department of Social  
19 Services, 436 U.S. 658 (1978), has failed to state a claim against  
20 the City; 4) plaintiff has failed to state a claim for violations  
21 of due process and equal protection, or for violation of the Eighth  
22 Amendment; and 5) plaintiff's claim for punitive damages against  
23 the city must be stricken because local governments are immune from  
24 punitive damages liability under both federal and state law.

## Background Facts

The complaint was filed on October 19, 2004. The complaint is

1 signed by Scott Crawford, on behalf of himself and attorney Bryan  
2 W. Dawson. Mr. Dawson is designated on the complaint as the trial  
3 attorney.

4 The complaint alleges that on October 20, 2002, plaintiff was  
5 sitting on the platform between the stairs at the Tri-Met MAX  
6 station near the Burnside Bridge, and that the officer defendants  
7 attacked him without warning, apparently believing he was in  
8 possession of a controlled substance. Complaint, ¶ 12. Although  
9 plaintiff did not resist, the defendant officers knocked him to the  
10 ground, held his arms behind his back, kicked his legs, punched his  
11 face, ground his face into the platform floor, and sprayed mace or  
12 pepper spray directly into his face and directly into his mouth.  
13 Id. When the officer defendants pulled plaintiff off the floor,  
14 they found that a small packet of cocaine had been lying beneath  
15 plaintiff's cheek, on the floor. Id. Plaintiff was arrested and  
16 placed in a cell for an hour, where he was interrogated. His  
17 requests for medical attention were ignored. Id.

18 Plaintiff alleges that as a result of this experience, he  
19 suffered physical injury and emotional trauma. Id. at ¶ 13.

20 According to the affidavit of James Rice, counsel for  
21 defendant City of Portland, the summons against the City of  
22 Portland was issued on February 25, 2005, and served on the City on  
23 February 25, 2005, 123 days after the complaint was filed.  
24 According to the affidavit of Mr. Dawson, who is plaintiff's  
25 counsel, Mr. Crawford resigned from the Oregon State Bar due to  
26 health problems on October 25, 2004. Mr. Crawford assigned his  
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1 cases to Mr. Dawson, but Mr. Dawson has never communicated with the  
2 plaintiff. Mr. Dawson does not deny that the individual defendants  
3 have never been served with summons, or that the City of Portland  
4 was served more than 120 days after filing of the complaint.

## Standards

The limitations period for plaintiff's § 1983 claim is established by Oregon's two-year statute of limitations for personal injury actions, Or. Rev. Stat. 12.110(1). See Wilson v. Garcia, 471 U.S. 261, 269, 276 (1985) (Because 42 U.S.C. § 1983 and most related federal civil rights statutes have no independent statute of limitations, the limitations period for commencement of § 1983 actions must be borrowed from state law, and § 1983 claims are to be characterized as personal injury actions). Plaintiff's cause of action accrued on October 20, 2002 and the complaint was filed on October 19, 2004, one day before the limitations period expired.

### **Discussion**

1. Is the action against the City and against the individual defendants time-barred because plaintiff has failed to make timely service?

The City argues that because plaintiff failed to make timely service on it under either Or. Rev. Stat. § 12.020(2) or Rule (m) of the Federal Rules of Civil Procedure, and has failed to make any service at all on the individual defendants, his action is time-barred.

In cases brought under 42 U.S.C. § 1983, federal courts borrow the state statute of limitations for personal injury actions.

1       Wilson, 471 U.S. at 261. However, the court is to borrow "[o]nly  
2 the length of the limitations period, and closely related questions  
3 of tolling and application," id. at 269, and is to "borrow no more  
4 than is necessary." West v. Conrail, 481 U.S. 35, 39 (1987).

5       The law of this jurisdiction is not clear on whether Rules 3  
6 and 4(m) of the Federal Rules of Civil Procedure or Or. Rev. Stat.  
7 § 12.020 govern the issue of when this action would be deemed  
8 commenced.

9       Under Or. Rev. Stat. § 12.020(2), an action is deemed  
10 commenced when the complaint is filed if the plaintiff effects  
11 service within 60 days. If service occurs more than 60 days after  
12 filing, the action is deemed to commence on the date of service.  
13 See also Baker v. Kennedy, 317 Or. 372, 375 (1993). Plaintiff's  
14 failure to effect service within 60 days means that under Or. Rev.  
15 Stat. § 12.020(2), his action would be deemed commenced on the date  
16 he served the City, February 25, 2005, well beyond the date the  
17 statute of limitations expired.

18       Rule 3 of the Federal Rules of Civil Procedure provides that  
19 a civil action is commenced by filing a complaint with the court.  
20 Rule 4(m) provides:

21       If service of the summons and complaint is not made upon  
22 a defendant within 120 days after the filing of the  
complaint, the court, upon motion or on its own  
initiative after notice to the plaintiff, shall dismiss  
the action without prejudice as to that defendant or  
direct that service be effected within a specified time;  
provided that if the plaintiff shows good cause for the  
failure, the court shall extend the time for service for  
an appropriate period.

26       Under Rule 4(m), if service of process is not accomplished  
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1 within 120 days of the filing of the complaint, the district court  
2 in its discretion may either dismiss the action without prejudice  
3 or order service within a specified time; however, if the plaintiff  
4 can show "good cause" for an extension, the district court *must*  
5 extend the time for accomplishing service. Tyson v. City of  
6 Sunnyvale, 159 F.R.D. 528, 529 (N.D. Cal. 1995). Even in the  
7 absence of good cause shown, relief may be justified if the  
8 applicable statute of limitations would bar the refiled action.  
9 Henderson v. United States, 517 U.S. 654, 662-63 (1996), quoting  
10 Notes of Advisory Committee on Rules, 1993 Amendment, New Rule  
11 4(m) .

12 In Strother v. Oregon, 1999 WL 558404 (D. Or. 1999), an action  
13 under 42 U.S.C. § 1983, Judge Jones of this court held that because  
14 Oregon's statute of limitations applied to the § 1983 claims,  
15 Oregon's rule governing commencement of actions, Or. Rev. Stat. §  
16 12.020, also applied, and rendered plaintiff's claim time-barred  
17 because he failed to serve the defendant within 60 days of filing  
18 the complaint. Plaintiff's claim accrued on July 23, 1993, and he  
19 filed the complaint on July 14, 1995. However, defendant was not  
20 served until March 1996.<sup>1</sup>

21 But Judge Frye of this court had earlier held that Or. Rev.  
22 Stat. § 12.020 conflicts with Federal Rule 3 and therefore cannot

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23       <sup>1</sup> So even if Judge Jones had found Federal Rules 3 and 4(m)  
24 applicable to the action, plaintiff's failure to serve the  
25 complaint within 120 days meant that he risked dismissal under  
26 the federal rules as well as § 12.020.

1 apply to § 1983 claims brought in federal court. Wells v. City of  
2 Portland, 102 F.R.D. 796, 800 (D. Or. 1984) ("The prevailing rule  
3 among the federal courts of appeals is that Rule 3 governs the time  
4 of commencement of the action in cases where a federal matter or  
5 cause of action is involved."); see also Hinz v. Weinstein, Civ.  
6 No. 95-262-JE (December 1, 1995) (reiterating the ruling in Wells).

7 In Keller v. City of Portland, 1998 WL 1060222 (D. Or. 1998),  
8 Judge Haggerty adopted the Findings and Recommendation of Judge  
9 Stewart, and agreed with Judge Frye that Rules 3 and 4(m) govern  
10 the time of commencement of the action in a § 1983 case.

11 Judge Stewart found that Or. Rev. Stat. § 12.020 was a  
12 "closely related" provision of tolling and application under  
13 Wilson, but that it must still be disregarded because it directly  
14 conflicts with Federal Rules 3 and 4(m).<sup>2</sup> The court relied on West,<sup>3</sup>  
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16 <sup>2</sup> It should be noted that in Torre v. Brickey, 278 F.3d 917,  
17 920 (9<sup>th</sup> Cir. 2002), the court held, in a diversity case, that  
18 there was no conflict between Rule 4(m) and Or. Rev. Stat. §  
19 12.020(2) because "Rule 4(m) merely sets a *procedural* maximum  
20 time frame for serving a complaint, whereas [Or. Rev. Stat. §  
21 12.020] is a statement of a substantive decision by that State  
22 that actual service on, and accordingly actual notice to, the  
23 defendant is an integral part of the several policies served by  
24 the statute of limitations." (Emphasis in original) The court  
25 concluded that a plaintiff in federal court has 120 days to  
26 effect service after filing a complaint *only if* this period  
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1 where the Supreme Court held that "[t]he governing principle is  
2 that we borrow only what is necessary to fill the gap left by  
3 Congress," which does not include service rules. 481 U.S. at 39-40,  
4 n. 6. The Court said in West:

5 Although we have not expressly so held before, we now  
6 hold that when the underlying cause of action is based on  
7 federal law and the absence of an express federal statute  
8 of limitations makes it necessary to borrow a limitations  
9 period from another statute, the action is not barred if  
10 it has been "commenced" in compliance with Rule 3 within  
the borrowed period. We decline respondents' invitation  
to require that when a federal court borrows a statute of  
limitations to apply to a federal cause of action, the  
statute of limitation's provisions for service must  
necessarily also be followed.

11 Id. at 39-40.

12 In Sorenson v. City of Portland, 2005 WL 525418, \*2 (D. Or.  
13 2005), Judge Aiken of this court declined to apply the state  
14 relation-back rule in a § 1983 case, on the ground that under the  
15 Supreme Court's holding in Wilson, 471 U.S. at 269, only the length  
16 of the limitations period and other closely related questions of  
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18 enables him to serve within the statutory period for commencing  
19 an action controlled by state law. Id. If there is no conflict  
20 between the federal rule and state law, state law should apply.

21 Id. However, Torre was a diversity case, and therefore governed  
22 by state law, rather than a § 1983 case with a borrowed state  
23 statute of limitations. Torre was distinguished on that basis by  
24 the court in Sorenson, *infra*.

26  
27 <sup>3</sup> West was not a § 1983 case.

1 tolling and application are to be governed by state law. The court  
2 noted that following West, the Ninth Circuit has interpreted  
3 "closely related questions of tolling" narrowly. Id.

4 I find the analysis of Judges Frye, Stewart and Aiken more  
5 persuasive, and conclude that under the Supreme Court's decision in  
6 West, the rules governing commencement of a § 1983 action for  
7 purposes of the statute of limitations are Federal Rules 3 and 4(m)  
8 rather than Or. Rev. Stat. § 12.020(2).

9 I turn now to the issue of whether plaintiff's complaint  
10 should be dismissed without prejudice under Rule 4(m) for failure  
11 to effect service within 120 days.

12 The only explanation plaintiff offers for the failure to serve  
13 the City within 120 days and the failure to serve the individual  
14 officer defendants is that Mr. Dawson has been unable to  
15 communicate with his client since shortly after the complaint was  
16 filed. Mr. Dawson requests an additional three months to locate his  
17 client and serve the remaining defendants.

18 Contact or communication between plaintiff and his attorney is  
19 in no way required for service on defendants who are known to  
20 plaintiff's counsel, as they are named in the complaint. Therefore,  
21 good cause for the failure to serve the defendants within the  
22 required period is not established.

23 Although Henderson and the 1993 Advisory Commission's note  
24 seem to favor the court's exercising its discretion to extend the  
25 time for service, even without a showing of good cause, when a  
26 refiled action would be dismissed on limitations grounds, I find  
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1 the circumstances of this case inappropriate for doing so. The  
2 complaint was filed over seven months ago. Some of the defendants  
3 have to this day still not been served. Plaintiff has not shown  
4 good cause for the failure to timely serve the defendants with  
5 process. The record indicates that plaintiff has chosen not to  
6 remain in contact with his attorney, strongly suggesting  
7 plaintiff's lack of interest in pursuing this case.

8 Statutory limitation periods are designed to promote justice  
9 by preventing the assertion of stale claims against a defendant.  
10 United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1217  
11 (9<sup>th</sup> Cir. 1996). See also New v. Armour Pharmaceutical Co., 67 F.3d  
12 716, (9<sup>th</sup> Cir. 1995) (purpose of statute of limitations is to  
13 motivate plaintiffs to diligently pursue their claims). The  
14 limitation periods for gaining access to the federal courts are not  
15 to be disregarded by courts out of a vague sympathy for particular  
16 litigants. United States v. Marolf, 173 F.3d 1213, 1218 (9<sup>th</sup> Cir.  
17 1999).

18 I therefore recommend that the City's motion to dismiss the  
19 action as time-barred be granted.

20 2. Has plaintiff failed to state a claim against the PPB?

21 The City moves to dismiss the PPB as a defendant on the ground  
22 that it is not a "person" subject to liability under 42 U.S.C. §  
23 1983. The City is correct. See Keller, 1998 WL at \*3 (holding that  
24 PPB is not a "person" subject to liability under § 1983). If my  
25 recommendation that the action be dismissed as time-barred is not  
26 adopted, I recommend that the City's motion to dismiss the claim  
27

1 against the PPB be granted.

2       3. Has plaintiff failed to allege the existence of a policy  
3           or custom of the City?

4           Congress intended the term "person" in § 1983 to include  
5 municipalities, including counties. Christie v. Iopa, 176 F.3d  
6 1231, 1234 (9th Cir. 1999). However, Congress did not intend to  
7 create respondeat superior liability, see Board of County Comm'rs  
8 of Bryan County v. Brown, 520 U.S. 397, 403 (1997), and isolated  
9 instances of official misconduct are insufficient to establish  
10 municipal liability under Monell, 436 U.S. at 690-91. See, e.g.,  
Tuttle v. Oklahoma City, 471 U.S. 808 (1985).

11          A plaintiff can establish municipal liability under City of  
12 Canton v. Harris, 489 U.S. 378 (1989) by showing that action  
13 pursuant to official municipal policy of some nature caused a  
14 constitutional tort. Monell, 436 U.S. at 691. To establish  
15 municipal liability, the plaintiff must show: 1) a municipal  
16 employee violated plaintiff's rights; 2) the municipality has  
17 customs or policies that amount to deliberate indifference as that  
18 phrase is defined by Canton; and 3) these policies were the moving  
19 force behind the employee's violation of plaintiff's constitutional  
20 rights, in the sense that the municipality could have prevented the  
21 violation with an appropriate policy. Gibson v. County of Washoe,  
22 Nev., 290 F.3d 1175, 1194 (9<sup>th</sup> Cir. 2002).

23          A local governmental entity's failure to train its employees  
24 can also create § 1983 liability where the failure to train  
25 "amounts to deliberate indifference to the rights of persons" with  
26 whom those employees are likely to come into contact. Lee v. City

1       of Los Angeles, 250 F.3d 668, 681 (9<sup>th</sup> Cir. 2001), quoting City of  
2       Canton, 489 U.S. at 388-89. For liability to attach, the identified  
3       deficiency in the local governmental entity's training program must  
4       be closely related to the ultimate injury. Id. In other words, a  
5       plaintiff must show that his or her constitutional injury would  
6       have been avoided had the governmental entity properly trained its  
7       employees. Id.

8       A claim of municipal liability under section 1983 is  
9       sufficient to withstand a motion to dismiss even if the claim is  
10      based on nothing more than a bare allegation that the individual  
11      officers' conduct conformed to official policy, custom, or  
12      practice. Watts v. County of Sacramento, 256 F.3d 886, 891 (9<sup>th</sup> Cir.  
13      2001); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1127 (9<sup>th</sup>  
14      Cir. 2002).

15      Plaintiff alleges in his complaint that the City, among other  
16      defendants, was "responsible for training and supervising the  
17      officer defendants," that it "failed to adequately train and  
18      supervise officers, including specifically the officer defendants  
19      here, in the proper, safe, and lawful manner of administering mace  
20      and/or pepper spray when effecting an arrest or otherwise  
21      performing the duties they were hired to perform," and that the  
22      "public body defendants" have "failed to adequately train officers  
23      in this regard with reckless and callous unlawful indifference to  
24      the rights of plaintiff and all other citizens." Complaint ¶ 14.  
25      This is sufficient to state a claim for municipal liability under  
26      Watts and Galbraith. If my recommendation that the action be  
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1 dismissed as time-barred is not adopted, I recommend that the  
2 City's motion to dismiss the § 1983 claim against it on this basis  
3 be denied.

4       4. Has plaintiff failed to allege a violation of due  
5 process?

6       The City moves to dismiss plaintiff's due process claim, on  
7 the ground that he has failed to state a claim for either  
8 substantive or procedural due process. I agree. Plaintiff's first  
9 claim for relief is captioned, "Violation of 42 U.S.C. § 1983:  
10 Fourth and Eighth Amendments, Due Process and Equal Protection."  
11 Under that claim, plaintiff alleges that he

12       ///

13       had a right under the Fourth Amendment of the U.S.  
14 Constitution to be free from unreasonable search and  
15 seizure, and a right under the Eighth Amendment to avoid  
16 cruel or unusual punishment. These rights inured to  
17 plaintiff and are enforced against the states under the  
18 Due Process Clause and the Equal Protection Clause in the  
19 Fifth and Fourteenth Amendments to the U.S. Constitution.

20       Complaint, ¶ 16.

21       When an explicit textual provision of the Constitution  
22 protects against the challenged government action, the claim must  
23 be analyzed under that specific provision alone and not under the  
24 more general guarantee of substantive due process.<sup>4</sup> This rule was

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25       <sup>4</sup> The Due Process Clause of the Fifth Amendment and the  
26 Equal Protection component thereof apply only to actions of the  
27 federal government—not to those of state or local governments.  
28       Schweiker v. Wilson, 450 U.S. 221, 227 (1981). The same standards  
are imposed on the states by the Fourteenth Amendment. Id. at n.

1 announced in Graham v. Connor, 490 U.S. 386 (1989), where the Court  
2 held that claims of excessive force brought under § 1983 must be  
3 analyzed under the explicit textual sources of constitutional  
4 protection found in the Fourth and Eighth Amendments, rather than  
5 under the "more subjective standard of substantive due process."  
6 Armendariz v. Penman, 75 F.3d 1311, 1319 (9<sup>th</sup> Cir. 1996). In  
7 Albright v. Oliver, 510 U.S. 266, 273 (1994), the Supreme Court  
8 reaffirmed the rule of Graham. ("Where a particular Amendment  
9 provides an explicit textual source of constitutional protection  
10 against a particular sort of government behavior, that Amendment,  
11 not the more generalized notion of substantive due process, must be  
12 the guide for analyzing these claims.") The Court noted, "The  
13 Framers considered the matter of pretrial deprivations of liberty,  
14 and drafted the Fourth Amendment to address it." Id. at 274.

15 If my recommendation that the action be dismissed as time-  
16 barred is not adopted, I recommend that the City's motion to  
17 dismiss plaintiff's due process claim be granted.

18 5. Has plaintiff failed to allege a violation of the Eighth  
19 Amendment?

20 The City moves to dismiss the Eighth Amendment claim on the  
21 ground that plaintiff was not a prisoner at the time he was  
22 allegedly subjected to unreasonable force. Plaintiff concedes the  
23 argument. The Eighth Amendment's prohibition on cruel and unusual

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24  
25 6. See also Lee, 250 F.3d at 683 ("Liberty is protected from  
26 unlawful state deprivation by the due process clause of the  
27 Fourteenth Amendment.")

1 punishment applies only after conviction and sentence. Graham, 490  
2 U.S. 386, 393 & n. 6. If my recommendation that the action be  
3 dismissed as time-barred is not adopted, I recommend that the  
4 City's motion to dismiss plaintiff's claim under the Eighth  
5 Amendment be granted.

6. Should plaintiff's claim for punitive damages against the  
7 City be stricken?

8 The City asserts that plaintiff's claim for punitive damages  
9 against the City is contrary to both federal and state law, citing  
10 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271  
11 (1981) ("[W]e hold that a municipality is immune from punitive  
12 damages under 42 U.S.C. § 1983.") and the Oregon Tort Claims Act,  
13 Or. Rev. Stat. § 30.270(2) ("No award for damages on any claim  
14 [against a public body or its officers, employees or agents acting  
15 within the scope of their employment] shall include punitive  
damages.")

16 Plaintiff counters with Memphis Community Sch. Dist. v.  
17 Stachura, 477 U.S. 299, 307 (1986), where the Supreme Court noted  
18 that in Smith v. Wade, 461 U.S. 30 (1983), the Court held that  
19 "punitive damages may be available in a proper § 1983 case," and  
20 Rogers v. Saylor, 306 Or. 267, 285 (1988).

21 In Smith, the Supreme Court held that punitive damages may be  
22 awarded against *individual* defendants under § 1983. Smith does not  
23 overrule the holding in City of Newport that municipalities are  
24 immune from punitive damages in § 1983 claims.

25 Plaintiff's reliance on Rogers is misplaced. A state statute  
26 purporting to immunize government conduct otherwise subject to suit  
27

1 under 42 U.S.C. § 1983 is preempted, even where the federal civil  
2 rights litigation takes place in state court. Martinez v.  
3 California, 444 U.S. 277, 284, n. 9 (1980); see also Owen v. City  
4 of Independence, 445 U.S. 622, 647, n. 30 (1980):

5 Conduct by persons acting under color of state law which  
6 is wrongful under 42 U.S.C. § 1983 ... cannot be  
7 immunized by state law. A construction of the federal  
8 statute which permitted a state immunity defense to have  
controlling effect would transmute a basic guarantee into  
an illusory promise; and the Supremacy Clause of the  
Constitution insures that the proper construction may be  
enforced.

9 Thus, the Oregon Tort Claims Act is invalid when applied to §  
10 1983 claims, regardless of whether the claims are litigated in  
11 federal court or state court. The Rogers court so held. 306 Or. at  
12 278-79. Because the damages awardable under 42 U.S.C. § 1983 are a  
13 matter of federal, not state, law, the Oregon Tort Claims Act is  
14 inapplicable to the § 1983 claim asserted in this case.

15 The Oregon Tort Claims Act does, of course, apply to  
16 plaintiff's claims based on state law and common law, to the extent  
17 that the individual defendants were acting within the scope of  
18 their duties, but not to any state or common-law claim plaintiff  
19 may have against individual defendants acting outside the scope of  
20 their duties. Rogers, 306 Or. at 273, 286.

21 If my recommendation that the action be dismissed as time-  
22 barred is not adopted, I recommend that the City's motion to strike  
23 the punitive damages claim be granted.

24 **Conclusion**

25 I recommend that the City's motion to dismiss (doc. # 3) be  
26 granted. If this recommendation is not adopted, I recommend that

plaintiff's claim against the PPB, and his Due Process and Eighth Amendment claims, be dismissed with prejudice and that the punitive damages claim against the City be stricken.

## Scheduling Order

5 The above Findings and Recommendation will be referred to a  
6 United States District Judge for review. Objections, if any, are  
7 due June 24, 2005. If no objections are filed, review of the  
8 Findings and Recommendation will go under advisement on that date.  
9 If objections are filed, a response to the objections is due July  
10 8, 2005, and the review of the Findings and Recommendation will go  
11 under advisement on that date.

Dated this 8th day of June, 2005.

/s/ Dennis James Hubel

Dennis James Hubel  
United States Magistrate Judge